BOOK REVIEWS

A TREATISE ON INTERNATIONAL LAW, with an Introductory Essay on the Definition and Nature of the Laws of Human Conduct. By ROLAND R. FOULKE, Philadelphia. THE JOHN C. WINSTON CO., 1920. Vol. I, pp. 482, lxxxviii; Vol. II, pp. 518, lxxxviii.

This is an ambitious attempt to reconstruct and re-define International Law. The author believes that most of the terms which are in current use in describing its source and character are ill-adapted to the purpose.

That purpose is to make plain certain rules of actual human conduct. "Conduct exhibits itself to man as a fact, and the philosophy of law is concerned with the proper jural conception of the external aspect of that conduct." (I, 30) "Law, as applied to human conduct, . . . is the jural conception of human conduct as influenced by external facts other than forces of nature." (I, 45.) "Law, therefore, has no motive, no activity, no purpose, is a pure philosophical speculation." (I, 48) "The history of law and the origin of law is simply a history of the origin and development of the various ideas or jural conceptions of conduct which have been entertained by thinkers from time to time in the past." (I, 50) What then is the relation of "law" to "right"?

"The word 'right' is used in so many different senses that it has lost all possibility of accurate significance." (I, 53.) "The author has not found any writer on international law who has clearly indicated the sense in which he uses the word, and most of the writers appear entirely unconscious of any ambiguity in it at all. It is believed that it is entirely possible to discuss any branch of law, and particularly international law, without using the word 'right.' It will accordingly be discarded from the discussion, although reference will be made from time to time to its use by the writers." (I, 54.)

But how far can the relations of sovereign States to each other be affected by any so-called rules of international law? The author replies by proposing further new definitions. "The word 'sovereignty' is ambiguous. It seems to be used to mean the independence and the inherent power of a State, as well as being used in other connections. The difficulty is that it is used to designate so many different attributes of a State that all possibility of accurate sense has been lost. We propose to waste no time in chasing shadows, and will therefore discard the word entirely. The word 'independence' sufficiently indicates every idea embraced in the use of sovereignty necessary to be known in the study of international law." (I, 69.)

"The State consists of the body of men exercising its power, and the government is the organ through which that power is exercised. To be accurate, we should therefore discuss international law in terms of government of the States, and say that the conduct of the government of independent States is determined by external factors of international life. This, however, is too cumbersome a phrase, and the meaning of the word 'state' as used in this connection is perhaps sufficiently clear, although not altogether free from ambiguity, to warrant its use in deference to established usage." (I, 82.)

What is within the jurisdiction of an independent State? What is within its power? "The word 'jurisdiction' is used in several senses, but we shall use it as meaning the exercise of State power. Some writers define it as a right to exercise State power, which involves a tautology, as the word 'right' can only mean power in this connection. This jurisdiction, or the exercise of the power of the

State, will prevail until overcome by a superior force. Consequently, the test of what is or is not subject to the jurisdiction of a State is the fact of the exercise of the power, and nothing else. No person can possibly be affected by the actual exercise of the power of the State merely upon any theory. All such power of the State is personal in the sense that it is exercised only upon persons. The power of the State can never affect anything but human conduct." (I, 124.)

Mr. Foulke presumably wrote before January, 1920, when the League of Nations was created. "The factors determining the conduct of an independent State are easily described, and a brief reference to them will be sufficient. There is no political authority external to an independent State, consquently no power which can afford redress for damage to a State interest, determine a dispute between two States, or coerce an independent State to perform any particular act. States do, however, observe habitual and uniform conduct in many particulars, to which they are influenced by certain factors, to understand which we must bear in mind that although States are in fact organisms, they are operated by men. No State can act without some one or more human wills determining that act. The behavior of the State will therefore be subject to the same principles as govern the conduct of men, because no man, upon assuming a State office, can divest himself of human attributes and become an impersonal machine. An independent State will be governed in its conduct by—(A) Self-interest, (B) Inherent prejudice, (C) International public opinion, (D) Custom or precedent, (E) Pressure from one or more other States, apart from political power." (I, 139). "International law, therefore, is the conception in terms of order of the conduct of independent States as influenced by external and internal factors, from which external factors are excluded the forces of nature and external political power, which we call the jural conception of the conduct. It is necessary to add internal factors which were excluded in the definition of law in general, because an individual State is frequently powerfully impelled by self-interest to observe a certain course of international conduct, and secondly, international public opinion will proceed in part from within each State, and it is difficult to separate that part of it which is external to a particular State, from that which is internal within that State." (I, 143.)

The work of the Hague Conferences of 1899 and 1907 is but slightly and lightly commented on.

"The recent writers appear to have laid too much stress on the conventions, particularly those of the Hague, supposing them to have a binding force which it turns out they do not possess. It is obviously impossible to make a barbarian wage war in a civilized way or suppose that he will do so merely because he signed some kind of a treaty or convention." (II, 49, 232.)

No reference is made to the important conventions framed by the four Congresses for the advancement of private international law, held at the Hague towards the close of the last century.

The author denies (I, 158) that international law is founded on the consent of nations. "It is not that the States consent to law, but that they voluntarily exist in a communiy life, which life necessitates law. The law goes with the community life. It might as well be said that a man who rides a bicycle consents to balance himself. The balance goes with the riding to which the consent is given." This hardly gives full weight to the voluntary existence in a community life. Every moment of continuous existence in such an order of life seems to imply consent. Japan long refused to lead a community life. When she opened her doors to it, she may be said to have agreed to its natural incidents.

A general treatise on International Law cannot well be written during a great war in which the country of the author is involved, nor until the international questions raised in its course have been settled or superseded in public interest.

On such subjects he will naturally incline to the views of his government, or else to the policy of silence. Mr. Foulke's comments on some of the acts of Germany during the world-war are extremely bitter. The following allusion to Count Bernstorff may serve as an instance. "Count Johann Von Bernstorff, the German Ambassador to the United States, covered himself with infamy in 1914-15-16 by his conduct in participating in the base intrigues of the German Government in violation of the neutrality of the United States of America." (II, 192, n.)

The author holds (I, 479, 480) that

"War between the parties will obviously have no effect on an executed treaty, but where the treaty is executory, will suspend further performance between the parties in so far as the hostile relations interfere with that performance. Where the treaty provides for hostilities, then the performance of the treaty is not prevened by the breaking out of the war. In the treaty of peace terminating the war, the states will confirm or reinstate treaties as they see fit.

"Although the writers have attempted to lay down rules as to what principles are applicable to the revival of treaties on the termination of war, it is believed they have entirely overlooked the facts of the case, which are—that it depends entirely on the agreement of the parties."

This seems to present a confusion of doctrine as to treaties providing for the obligations of the contracting Powers, in case of future hostilities. The performance of such a treaty is said (I, 479) to be "not prevented," yet its revival on the termination of the war "depends entirely on the agreement of the parties." But a treaty expressly declaring a rule of conduct in case of war, must, to give the declaration any meaning, govern in the only state of things to which it is applicable. The United States took that view at the opening of the Spanish war in 1898. Our treaty of 1795 with Spain provided that

"For the better promoting of commerce on both sides, it is agreed, that if a war shall break out between the said two nations, one year after the proclamation of war shall be allowed to the merchants, in the cities and towns where they shall live, for collecting and transporting their goods and merchandizes: And if anything be taken from them or any injury be done them within that term, by either party, or the people or subjects of either, full satisfaction shall be made for the same by the government."

Spain claimed that war *ipso facto* terminated the entire treaty, and we insisted that the rights of merchants for a year remained unimpaired (5 Moore, International Law Digest (1906), 375). The ambiguity in Mr. Foulke's statement is to be regretted, in view of the question raised by German merchants, on the somewhat similar clause in Article XIII of our treaty of 1785 with Prussia.

Mr. Foulke's style is not of the clearest, nor does it always accord with the rules of English grammar. We find, for instance, this huddle of words:

"A State may exist as such, be independent, be a member of the family of nations, as to which see §80, post, and all of which must be clearly distinguished."

The proof reader seems to have done his work badly, particularly in the matter of Latin words. Thus we find *"Not constat"* for *"non constat," "retorsio de juris"* for *"retorsio juris," "jus angarie"* for *"jus angariae," "lex talonis"* for *"lex talionis,"* and *"juri belli"* for *"jure belli."*

The book is well indexed. It has evidently been based on wide reading, and the notes are valuable, but one closes it with the feeling that the author has overshot his mark.

SIMEON E. BALDWIN

STORY'S COMMENTARIES ON EQUITY JURISPRUDENCE. Third English Edition. By A. E. RANDALL. London: SWEET AND MAXWELL, LTD., 1920. pp. xxxvii, 673.

EQUITY: An Analysis and Discussion of Modern Equity Problems. Missouri Edition. By GEORGE L. CLARK. Columbia, Mo.: E. W. Stephens Publishing Co. 1920. pp. lii, 793.